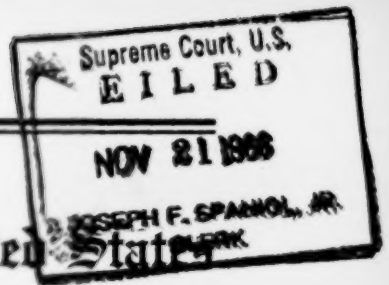


No. 86-614

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES C. WELCH,

Petitioner,

— against —

CARSON PRODUCTIONS GROUP, LTD.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**PETITIONER'S REPLY BRIEF
TO RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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Since the agreements Carson made with Philip Morris for its copyrighted materials and with the Screen Actors Guild for its consent both provided for the re-run on public television of commercials advertising Benson & Hedges cigarettes they are both prima facie violative of Section 1335 of the Public Health Cigarette Smoking Act and are therefore unlawful, null and void and, as such, are of no binding effect whatsoever on petitioner.

The denial to petitioner of the right to be heard and prove the absolute defense of illegality, together with the concomitant important public interest involved in keeping the airways free of such cigarette advertisements and in putting an end to and making an example of such blatant disregard and subversion of the U.S. Public Health Cigarette Smoking Act, amply warrants this Court's granting the Writ of Certiorari prayed for herein.....

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CHARLES C. WELCH,

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On Petition for Writ of Certiorari to the United
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PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN
OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

In accordance with the Rules of the Supreme Court petitioner respectfully interposes this Reply to the items and arguments put forward by the respondent in opposition to this Court's granting of a Writ of Certiorari herein.

The Facts of the Petition and Appendix

Fortunately for the interests of brevity herein, most of the material for this reply and rebuttal is already contained in the items and excerpts set forth in the Appendix to the Petition, the correctness of which has not been denied by respondent.

Plaintiff accordingly submits, in summary, the following facts as pertinent to this Reply:

- that the unlawful agreement made by Carson with Philip Morris Inc is spelled out in paragraphs "6", "7" and "8" of the complaint (cf pages A-17 et seq of the Appendix), and
- that such issue of illegality of the Philip Morris contract/license and of any third-party consent, as from SAG, is spelled out in the Joint Pre-Trial Order (cf pgs A-21 and A-22 of said Appendix), and
- that because of the district court's rule of silence imposed regarding the illegality of cigarette commercials (cf A-26) and said court's prohibiting any mention of the Public Health Cigarette Smoking Act in counsel's opening to the jury and throughout the trial, none of the facts and circumstances of illegality regarding the inception, execution and performance of said illegal contract, agreements or consents could be developed at trial.

Now, at this point, petitioner respectfully submits to this Court that it is basic to our law of due process that a litigant has the constitutional right to

plead and prove, i.e., to raise, as many defenses as are available to him.

Such basic right contained in the 5th Amendment is stated in 16A American Jurisprudence 2d, 1048, Constitutional Law, Section 843:

"Right to Raise Issues and Defenses:

"Due process requires that a party sought to be affected by a proceeding shall have the right to raise such issues or set up any defense which he may have in the cause.

"The right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues ... the fundamental law of the land secures to him the right to be heard in his own defense.

"A hearing which does not give the right to interpose reasonable and legitimate defenses cannot constitute due process of law."

Also petitioner's right to show illegality of contract is stated in 30 American Jurisprudence 2d, Section 1035, as follows:

"Thus, parol evidence is admissible to show that a contract valid on its face is a mere cover for an illegal transaction ... or that a contract was otherwise illegal at its inception.

"Facts showing illegality may be proved, whether such illegality arises from the furtherance of objects forbidden by statute, or common law, or by the general policy of the law."

The Joint Pre-Trial Order statement of illegality is clearly stated on Appendix Page A-21 as follows:

"(2) That perforce of said Public Health Cigarette Smoking Act of 1969 that any consent or licensing or contract that provides or arranges advertisements of cigarettes on any medium of electronic communication is illegal and void."

Accordingly, it is clear from the undisputed facts of this case that petitioner had the constitutional right to be heard at trial on such issue in his opening statement and to offer his proof of illegality under Section 1335 of the Public Health Cigarette Smoking Act as to both the Philip Morris and the Screen Actors Guild agreements that were required to be obtained by Carson in order to use the Benson & Hedges cigarette commercial in its production entitled "Television's Greatest Commercials."

REPLY TO RESPONDENT'S OPPOSITION

At the outset, it should be noted that respondent's opposition brief has not addressed in any specific manner the five enumerated Questions Presented nor has respondent denied the absolute defense of the law of illegality of contract as expressed by this Court in Oscanyan v Arms Co, 103 U.S. 268.

It is clear, therefore, that respondent has not presumed to deny that there is such a thing in the civil law as the affirmative defense of illegality and that, once such a defense is proven, the party's (here, Carson's) case is contaminated.

In the further words of Oscanyan:

"Where the contamination reaches (here the collective bargaining agreement with Screen Actors Guild) it destroys."

The law of illegality in the State of New York further provides that such statutory illegality of agreement applies even though only one party's action (here Carson and Philip Morris) would be in violation of the statute but not the other (here Screen Actor's Guild). See Estate of Sanchez, 481 NYS 2d 601, 604, where it was stated:

"... It has long been settled law that a contract made in violation of either a constitution or statute is an unlawful undertaking and, as such, is void and unenforceable." (citing, among others, the Kaiser-Fraser case).

"... It has been held that non-enforceability of a contract made in violation of a statute results even though only one party's action would be in violation of the statute. (citing)..."

Also, the respondent's attempt to convey the impression that the Screen Actor's Guild was opposed to Mr. Welch's suit against Carson is not true - the Record belies it.

This was evidenced at trial by the letter of Screen Actor's Guild (cf copy on page RA-1) showing that Mr. Welch was told by Screen Actor's Guild prior to this suit that he was free under a landmark New York case to pursue his rights against Carson in Court under the Civil Rights Law of the State of New York.

The Screen Actors Guild officer who wrote that letter was subpoenaed to trial by petitioner and testified (without contest or cross-examination by respondent) as follows:

"Q - Insofar as the Screen Actors Guild was concerned he (petitioner) had a right to proceed on his own, is that correct?

"A - Correct."

MR. COSTELLO: That's all.

MR. HUFF: No questions."

Also, the business representative of Screen Actors Guild testified that Carson never informed her and kept her in the dark about the Public Health Cigarette Smoking Act in his license with Philip Morris (cf excerpts from testimony attached hereto on pages RA-2 and RA-3).

Further to this Reply, respondent's red herring reference to the late Judge Werker's use of the word "advertising" has nothing to do with the questions before

this court. Illegality was never rendered res judicata in the lower court. If it were, petitioner's enumerated affirmative defense of illegality would not have been permitted to be included in the Joint Pre-Trial Order herein (A-21). Further, respondent's allusion to evidentiary Rule 403 is fallacious inasmuch as proof of illegality of contract necessarily involves a violation of the law and cannot be proven otherwise.

Petitioner submits that respondent has not denied that the circuit court of appeals panel followed the district court's decision, and, accordingly, sub silentio, has affirmed the lower court's directed verdict without any consideration of illegality of contract or the Public Health Cigarette Smoking Act.

At this juncture therefore petitioner respectfully submits (1) that the district court's treatment of this case with respect to the non-trial of the issue of illegality and the Public Health Cigarette Smoking Act was not a mere evidentiary error but was a very very substantial departure from accepted judicial trial proceedings and (2) that the appeals court panel's sanction, sub silentio, of such departure therefore renders appropriate the Court's application of Supreme Court Rule 17,1.(a) to this case.

Suggestion as to Rule 17,1.(a) Consideration

In a single-sentence synopsis, this case of illegality of Carson's use of TV cigarette advertising (commercials) was placed squarely at issue at trial and petitioner's right to be heard and to adduce proof thereof was completely denied to him, and, on appeal, such extraordinary departure from accepted judicial proceedings at trial was sanctioned, sub silentio, by the appeals panel as is reflected in its published decision which also totally ignored the issue of illegality and federal legislation, namely Section 1335 of the Public Health Cigarette Smoking Act that was enacted in the public interest to prevent such cigarette advertising from being carried to the country on public TV channels.

Accordingly, petitioner respectfully submits that in addition to the reasons given in the Petition for the granting of the Writ sought herein this Court may also consider the far-out departure from the course of accepted judicial proceedings at trial herein that was sanctioned sub silentio by the appeals court to be such as to call for this Court's power of supervision pursuant to Rule 17,1.(a) of the Rules of the Supreme Court.

Recapitulation, Summary and Conclusion:

The respondent's arguments are not pertinent or relevant to the Questions Presented to this Court.

Nor has respondent addressed the matter of non-trial of petitioner's affirmative defense of illegality, or the lower courts' failure to apply the Public Health Cigarette Smoking Act to either the Philip Morris or the Screen Actors Guild agreements which were necessary in the first instance to be gotten by Carson in order for him to rerun commercials containing petitioner's picture.

As to this petitioner further respectfully submits that since the agreements Carson made with Philip Morris, whereby he was supplied with the Benson & Hedges copyrighted TV materials, and the Screen Actors Guild collective bargaining agreement, whereby he allegedly obtained the necessary written consent of petitioner, were both required before Carson could have a "right" to use these commercials in his production "Television's Greatest Commercials", they are both prima facie violative of Section 1335 of the Public Health Cigarette Smoking Act and are therefore illegal, null and void and, as such, are of no binding effect whatsoever on petitioner.

Lastly, plaintiff most respectfully submits

that the aforescribed denial to petitioner of the right to be heard and to prove this absolute defense of illegality, together with the concomitant important public health interest involved in keeping the airways free of lethal cigarette advertisements and (1) in stopping such indirect TV cigarette advertising and (2) in making an example of such reckless disregard and subversion of the U.S. Public Health Cigarette Smoking Act, amply warrants this Court's granting the Writ of Certiorari prayed for herein and, ultimately, in ordering the remand of this case for a trial on the merits of such issue of illegality.

Respectfully submitted,

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PETITIONER'S APPENDIX TO REPLY BRIEF

RA-1

SCREEN ACTORS GUILD



January 3, 1983

Mr. Charles C. Welch
610 West End Avenue
Apartment #PH-C
New York, New York 10024

Re: Carson Productions
"TV's Greatest Commercials, Part II"

Dear Charlie:

I am in receipt of the release form sent you by Carson Productions for the use of two commercials in which you appeared.

While the form is primarily general in nature, the last sentence of the second paragraph does refer to the applicability of the Screen Actors Guild Television Contract to which this producer is signatory.

However, as you are well aware, you may reject any part or all of this offer and you may proceed on your own. We are all quite familiar with Welch v. Mr. Christmas Inc. and we, too, consider it a landmark in the protection of Actors' rights.

Should you wish the Guild to pursue your claim for minimum, Mr. Roberts and Ms. Krone in the Screen Actors Guild Hollywood office are the persons to contact.

Sincerely,

Elinor London
Assistant Executive Secretary
EL:jw

cc: Jack Roberts)
Kat Krone) SAG Hollywood

EXCERPTS OF TESTIMONY OF SCREEN ACTORS GUILD
BUSINESS REPRESENTATIVE, KAT KRONE:

During cross-examination the Hollywood Screen Actors Guild witness Kat Krone freely admitted that the question of the illegality of the use of these cigarette commercials was not the subject of any discussion nor had she ever beforehand seen or been shown a copy of the controversial Philip Morris cigarette licensing contract Carson had with that company:

"Q - Were you fully informed by Carson Productions as to their contract, for example, with NBC Entertainment, did you know the terms and conditions of that?

"A - It was never discussed.

"Q - Did you know the terms and conditions of the license that they received from Philip Morris to use the commercial "Disadvantages"?

"A - No.

"Q - You were not shown any of that by Carson, were you?

"A - You are talking about their licensing?

"Q - Yes. From Philip Morris.

"A - No."

This SAG business representative had therefore admitted she had never even seen or examined the license of Philip Morris or the Public Health Cigarette Smoking

Act of 1969.

So it is apparent from the Record that the Screen Actors Guild never took into consideration that there was an important public health statute involved when it gave its alleged consent for the reuse of this cigarette commercial (A-526):

"Q - Did you ever see this exhibit (the Benson & Hedges Cigarette Commercial license), Plaintiff's Exhibit 16 in evidence?

"A - No."

The issue of illegality of the Philip Morris license/contract cannot therefore be said to have ever been within the comprehension of the SAG Hollywood representative when she made the alleged collective bargaining agreement with Carson Productions.

What is the only conclusion?

That her consent was based on a mere presumption of legality that was nowhere established by Carson Productions in the Record of this case.